LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 11 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

JULY TERM, 1973

NO. 73-172

JOHN R. FOWLER and JAMES S. GREEN,
Petitioners,

versus

STATE OF GEORGIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION

ELDRIDGE W. FLEMING
3 Oak Street
P. O. Box 157
Hogansville, Georgia 30230
Telephone: (404) 637-4523

WILLIAM F. LEE, JR.
21 Spring Street
P. O. Box 8
Newnan, Georgia 30263
Telephone: (404) 253-8175

IN THE

Supreme Court of the United States

JULY TERM, 1973

NO. 73-172

JOHN R. FOWLER and JAMES S. GREEN,
Petitioners,

versus

STATE OF GEORGIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Georgia (App. A of Petition) is reported in *Fowler v. State*, 128 Ga. App. 501, ____ S.E.2d ____ (1973).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1.

Whether a probable cause for the issuance of a search warrant can be established by oral testimony sworn by the affiant at the time of the issuing of the warrant in addition to the information appearing on the affidavit?

2.

Whether the "John Doe" warrant authorizing the search of a specific premises is defective?

3.

Whether a campus policeman who is also a deputy sheriff in a neighboring county empowered under state law to make an application for a search warrant to search a dormitory room on the campus on which he is a policeman?

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Ga. Code 32-168. "Authority of campus policemen and other security personnel to make arrests on university property.—The campus policemen and other security personnel of the University System of Georgia shall have the power to make arrests for offenses committed upon

any property under the jurisdiction of the Board of Regents of the University System of Georgia."

Ga. Code 27-314: "A search warrant may be issued only upon the application of an officer of the State or its political subdivisions charged with the duty of enforcing the criminal laws. It shall not be issued upon the application of a private citizen or for his aid in the enforcement of personal, civil or property rights."

Federal Rules of Criminal Procedure, Rule 41(c): ". . . Before ruling on a request for a warrant the Federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made a part of the affidavit. . . ."

Georgia Code 79A-9917: As Amended, particularly Ga. Laws 1973, p. 688: "Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, and such person would have qualified for the conditional discharge provided for herein but for the fact that the judge chose not to avail himself of the authority granted by this Section or that the person violated the conditions imposed by the court, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed twelve months or a fine not to exceed $1,000, or both. Subsequent offenses shall be punished as provided by law."

STATEMENT OF THE FACTS

The defendants were convicted of possession of less than one ounce of marijuana. Their pretrial motion to

suppress evidence was denied. The search warrant authorized a search of "John Doe" and the premises described as Room 124, Pritchard Hall, West Georgia College, Carrollton, Georgia. The affidavit to support the warrant (App. C of Petition) stated that the affiant had received information from an informant "who in the past has given reliable information that in Room 124, Pritchard Hall, West Ga. College, Carrollton, Ga. there is being concealed Marijuana and other Dangerous and Prohibited Drugs." The affidavit was executed by James T. Hallman, an investigator with the West Georgia Police Force who was at the same time also a Deputy Sheriff of Douglas County, Georgia, a county neighboring the county in which West Georgia College is located. (App. B of Petition, A-5)

At the hearing on the motion to suppress, the magistrate testified that in addition to the information contained in the affidavit, Officer Hallman gave sworn oral testimony to the effect that the reliable informant had given him information in the past that had led to three drug arrests and that the informant had stated to Officer Hallman that on the 24th of September, the previous day, that he had seen drugs in this particular room within the past three days. (App. B of Petition, A-13).

Upon execution of the warrant, the marijuana was found in a bureau drawer in Room 124 of Pritchard Hall.

STATEMENT AND ARGUMENT

Question 1

The petitioners in their petition have presented a scholarly general summary on the law of search and seizure. Nowhere in their petition, however, do they cite any

specific applicable authority that would require this Court to grant the requests of the petition.

It is well established that a request for a search warrant may be based upon hearsay information. *Jones v. United States*, 362 U.S. 214, 83 S.Ct. 73, 9 L.Ed. 2d 88 (1960). It is equally well established that where the affidavit contains hearsay information there must be a showing that the informant is reliable. *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969). The fact that an informant has given reliable information in the past is an example of showing that he is reliable. *Jones v. United States*, supra; *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965).

Based on the foregoing authorities, and the facts set out earlier in this brief, there is no question that the magistrate had presented to him sufficient information upon which to find probable cause to issue a search warrant. The question arises as to whether all the information upon which the magistrate's determination of probable cause is based must appear on the face of the affidavit or warrant.

The petitioners claim that this Court's decision in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1409, 12 L.Ed. 2d 723 (1964), requires a finding that the magistrate in the instant appeal did not have probable cause before him upon which to issue the warrant. Such a claim is without any sound basis.

This Court in *Aguilar* held that the search warrant, issued by a Texas justice of the peace, should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause. That opinion

states, however, that if other information than that contained in the affidavit "had been appropriately presented to the magistrate, this would, of course, present an entirely different case." *Aguilar v. Texas*, supra, 378 U.S. at 109. The state and federal constitutions require only that the finding of probable cause be supported by oath or affirmation. The petitioners have cited no case on this question.

We know of no case holding that if information sufficient to uphold a determination of probable cause is presented under oath to a state magistrate, the failure to record the information in the form of an affidavit invalidates the search warrant. As a matter of fact another decision in the Georgia appellate courts upholds the ruling of the decision appealed from by the instant petition. That decision is *Marshall v. State*, 113 Ga. App. 143, 147 S.E. 2d 666 (1966), and it holds that the information supporting the finding of probable cause may be presented by means of an affidavit or by oral testimony. A Fifth Circuit decision in *Dewitt v. United States*, 383 F. 2d 542 (5 Cir., 1967) held that probable cause for the issuance of a search warrant was established by matters set forth in the warrant, supporting affidavit, and *sworn testimony* so that the warrant and subsequent search met the constitutional standards and the evidence obtained in the search was not subject to suppression.

This Court expressly limited its decision in *Aguilar* to the situation where the facts and circumstances shown in the affidavit were the only facts presented to the magistrate. In the instant petition the affiant presented the additional facts under oath at the time of showing probable cause to the magistrate. To grant the requests of this

petition would amount to an extension of the decision in *Aguilar* which is a result that this Court did not care to reach in *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971).

It is clear that there are no controlling federal standards on this question, and in the absence of such standards, the lawfulness of the search is determined by state law. *United States v. Hooper*, 320 F. Supp. 511 (E.D. Tenn, 1969), aff'd 438 F. 2d 968 (6 Cir., 1970), cert. den. 400 U.S. 929, 91 S.Ct. 186, 27 L.Ed. 2d 190 (1970); *United States v. Williams*, 351 F. 2d 475, 477 (6 Cir., 1965).

In *Ker v. California*, 347 U.S. 23, 34, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963), this Court said, "the States are not thereby precluded from developing workable rules governing arrests, searches, and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures." In the instant petition we have a situation where the State of Georgia has developed such a workable rule, and therefore the search and seizure here were in compliance with the requirements of the constitution.

The words of this Court in *United States v. Ventresca*, supra, 380 U.S. at 108, are most appropriate. There the Court said:

> "The Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be treated and interpreted by magistrates

> and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst of criminal investigations. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing Courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

These principles should be followed and the petitioners' conviction upheld.

Question 2

The petitioners claim that using a "John Doe" warrant rendered the search illegal. This claim also is without any sound basis.

The lower court said that it would have had no hesitancy to rule that the warrant was invalid if the search had been limited to the search of the person for no other reason than for lack of identifying circumstances as to a description of the person to be searched. (App. A of Petition, A-1, 2). The incriminating evidence, however, was found as a result of a search of the premises, and not of a person.

In *United States v. McClard,* 33 F. Supp. 158 (E.D. Ark., 1971), aff'd 462 F. 2d 488 (8 Cir., 1972) it was held that the "John Doe" caption of an affidavit in search warrants did not render them defective where the search was of described premises and for described items rather than of an individual.

Therefore, under the circumstances of the instant petition, the "John Doe" warrant is not illegal.

Question 3

The petitioners claim that Officer Hallman, who is an officer of the West Georgia College Police Department as well as a deputy sheriff in a neighboring county, was not authorized to apply for the search warrant.

Sections 27-303 and 27-3147 of the Georgia Code Annotated clearly provide that any officer of the state or its political subdivisions charged with the duty of enforcing the criminal laws may apply for a search warrant. Under these statutes, Officer Hallman as a deputy sheriff was clearly authorized to apply for the warrant. Based on these statutes, the Court of Appeals of Georgia found it unnecessary to decide the question of whether a campus policeman may apply for a search warrant.

This question obviously involves a state court's decision as to state law. Such decisions are generally accepted by this Court. The petitioners, however, claim that the Georgia appellate court's decision on Georgia law would thwart their protection of a federal constitutional right.

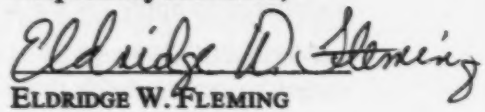
No decision has been cited by the petitioners directly in point in their contention. The only case cited, *Huff v. Walker*, 125 Ga. App. 251, ____ S.E. 2d ____ (1972), is not in point, nor is it analagous, as a reading of that decision will show.

On this question it is obvious that the Georgia appellate court's decision construing Georgia law does not infringe upon the petitioners' protection against unreasonable searches and seizures and that this Court should leave the state appellate court's decision undisturbed. This question is frivilous and should require no further argument.

CONCLUSION

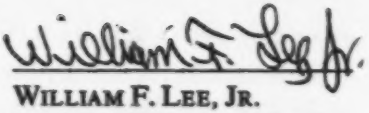
For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,



ELDRIDGE W. FLEMING
District Attorney
Coweta Judicial Circuit

3 Oak Street
P. O. Box 157
Hogansville, Georgia 30230
(404) 637-4523



WILLIAM F. LEE, JR.
Assistant District Attorney
Coweta Judicial Circuit

Attorneys for Respondent

21 Spring Street
P. O. Box 8
Newnan, Georgia 30263
(404) 253-8175

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief for Respondent in Opposition upon Mr. G. Hughel Harrison, Harrison & Garner, P. O. Box 88, Lawrenceville, Georgia 30245, Attorney for Petitioners by depositing the same in the United States Mail in a properly addressed envelope with adequate postage affixed thereto to assure delivery.

This the 10th day of October, 1973.

William F. Lee Jr.

Attorney for Respondent